IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-56

IN THE MATTER OF EDNA SMITH,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

REPLY BRIEF FOR THE APPELLANT

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Introduction

The case briefed by South Carolina, the appellee, is not the case before this Court. Numerous "facts" relied on by the state appear nowhere in the record. Other facts are distorted or ignored. Even so, the basic facts in this case are still not in dispute. Of the six key facts summarized in appellant's brief at 8-9, appellee accepts five, and disputes (unsuccessfully, as we point out infra), only the sixth.[1/] Under controlling decisions of this Court, those undisputed facts require reversal of the decision below.

1/ Appellee's brief does not dispute the following five facts set forth in appellant's brief at 8-9:

(1) Appellant Edna Smith was invited by Gary Allen, a local businessman, to attend a meeting of poor, black Medicaid mothers to discuss their constitutional rights concerning forced or unwanted sterilization as a condition for continuing to receive Medicaid assistance.

(2) At that meeting, appellant met Mrs. Marietta Williams, who had undergone a sterilization operation.

(3) Thereafter, appellant was contacted by Allen, who told her that Mrs. Williams wanted a lawyer to represent her

[Footnote Continued]

Indeed, appellee now concedes, for the first time, that "Appellant's conduct in meeting with the women to advise them of their legal rights, even if such advice was unsolicited" was protected under the First Amendment and NAACP v. Button, 371 U.S. 415 (1963) (see Brief for Appellee at 30). That concession requires reversal, or at least a remand for clarification,

[Footnote 1 Continued]

in a suit for damages against the doctor who had sterilized her, but was unwilling to write to appellant.

(4) After conferring with the South Carolina ACLU, appellant wrote to Mrs. Williams and told her the ACLU (not appellant or her associates) "would like to file a lawsuit on your behalf for money damages against the doctor who performed the operation".

(5) Mrs. Williams eventually decided not to sue. Accordingly, no lawsuit resulted from the letter in question, and appellant had no further contact with Mrs. Williams.

because the opinion below seems clearly on its face to rely on both the "unsolicited advice" given at the Aiken meeting, and the "solicitation" letter of August 30th:

> "Here, by respondent's own testimony, she met with Mrs. Williams in Aiken, gave unsolicited advice as to what her rights were as she, the respondent, saw them. Then respondent followed up with her letter of August 30, 1973, wherein she solicited Mrs. Williams to join in a class action suit for money damages to be brought by the ACLU."
> Appendix to Jurisdictional Statement at 9a. 2/

I. Appellee's "Factual" Assertions Find No Support In The Record, Or Are Exaggerated, Misleading and Taken Out of Context.

(1) Appellee seeks to distinguish NAACP v. Button, 371 U.S. 415 (1963) by

2/ Appellant's suggestion that the Court might vacate and remand the decision below is also supported by the fact that South Carolina did not have the benefit of this Court's decision in Bates v. State Bar of Arizona, ____ U.S. ____, 97 S. Ct. 2691 (1977) when it considered this case. It would be appropriate for that court to assess its public reprimand in light of the analysis presented in Bates.

asserting that appellant and the ACLU "would" derive financial benefit from rendering legal services.3/ The record provides no support for the assertion. At the time of the relevant events, it would have been impossible for plaintiffs in any suit such as the

3/ Appellee's Brief at 29. As construed by the South Carolina Supreme Court, DR 2-103(D)(5)(a) and (c) prohibits

> "a lawyer who assists or cooperates with a non-profit organization that furnishes or pays for legal services to its members or beneficiaries, from recommending to a non-lawyer that he retain the organization's lawyers if: 1) the organization has a primary purpose of rendering legal services, or 2) the organization derives financial benefit from rendering the legal services."

Brief for Appellee at 49. Although the version of DR2-103(D) relied on by South Carolina was excised from the American Bar Association's Code of Professional Responsibility, in 1974, and replaced by a new rule, South Carolina has retained the former version. As is clear from the ABA's revision, DR 103(D) was never intended to regulate public interest legal organizations, but was designed to regulate group pre-paid legal services plans. See, e.g., DR2-103(D)(4)-(7). See also Brief for Amicus Curiae The State Bar of California, Appendix D. The ACLU would clearly qualify for an exemption under the ABA DR2-103(D).

one discussed by appellant to recover attorney's fees, absent an "extraordinary" showing. Bradley v. School Board of City of Richmond, 345 F. 2d 310, 321 (4th Cir. 1965). It was certainly not likely that the ACLU "would" receive such fees.4/

As for appellant, at the time of the events at issue here, Policy #512 of the American Civil Liberties Union provided that "[u]nder no circumstances may any cooperating attorney associated in any way with an ACLU or affiliate case receive payment for services rendered in such a case, whether as a fee or voluntary donation." Policy #512 was amended in 1977, to allow state affiliates, but not the national ACLU, to adopt a temporary policy on an experimental basis that would allow their

4/ In addition, the panel repeatedly stressed that it was not "trying" the ACLU. It is therefore disturbing, and inconsistent with basic concepts of due process, to find the reprimand justified by appellee on the ground that appellant's recommendation to Mrs. Williams was improper because the ACLU "derived financial benefit from rendering legal services." Brief for Appellee at 49. See also App. at 10a.

cooperating attorneys to share in any court award of attorneys fees. The South Carolina affiliate, however, has never adopted such a policy. Moreover, the Court below did not find that appellant would be personally involved in any litigation resulting from the Aiken meeting or the August 30th letter, and there was no evidence that she could or even attempted to parlay her non-litigative educational efforts into foundation support for public interest litigation. Compare Brief for Appellee at 5.

(2) Appellee characterizes Mrs. Williams' testimony as stating that the letter was part of "a campaign to influence" her. Brief at 11. But the only attorney who asked Mrs. Williams whether she would "sign" anything in connection with a lawsuit, and who confronted her in person, was an attorney for Dr. Pierce.5/ See Brief

5/ The state relies heavily on appellant's alleged pressuring of Mrs. Williams, and infringement of her right of privacy. But it is undisputed that the only contacts appellant (or anyone under her direction or control) ever had with Mrs. Williams were the July meeting, which appellee now concedes was constitutionally protected
[Footnote Continued]

for Appellant at 47 n. 1.

(3) Appellee repeatedly characterizes the letter as mere "commercial speech", and contends that "it merely recited the desire of the ACLU to bring a lawsuit on behalf of Mrs. Williams for money damages." Brief at 11. See also Brief at 33-34. According to appellee, since the letter "conveyed neither ideas or information, her conduct in writing the letter did not promote informed decision making,...and should not be afforded protection under the First Amendment." Brief, at 34. The text of the letter flatly contradicts those characterizations. The letter does not provide a dotted line for Mrs. Williams to sign,6/ and does not even request immediate approval

[Footnote 5 Continued]
activity, and the August letter, which uncontradicted evidence shows was written by appellant only after Mr. Allen told her that Mrs. Williams wanted legal representation. Certainly Allen's own contacts with Mrs. Williams cannot be charged to appellant: he was not an attorney,and was not associated professionally with either appellant or the ACLU.

6/ Compare the release secured by Dr. Pierce's attorney, who has not been charged with overreaching. Brief for Appellant at 47 n. 1.

of the proposed litigation. Rather, it informs Mrs. Williams that appellant will, if Mrs. Williams so desires, "explain what is involved so you can understand what is going on." J.S. App. at 25a. The letter continues "I want you to decide", and states that appellant will "come down to talk" about the case if Mrs. Williams is interested. J.S. App. at 25a-26a . Clearly, the letter by its terms was an offer to meet and convey additional information relevant to the proposed litigation. In addition, the letter expressed the opinion that coerced sterilizations should be stopped, and proposed educational activities designed to create greater public awareness of the issue.

(4) Appellee sets forth eight allegedly compelling state interests to justify "the restraints on personal solicitation of legal business" which the reprimand supposedly vindicates. Brief at 38-49. But where in the record is there any evidence that appellant has been guilty of "personal solicitation" or "invading the privacy of

the home"? Appellee's Brief at 30.[7] Appellee now concedes that appellant's conduct at the July meeting was constitutionally protected. The only other contact appellant had with Mrs. Williams was a single letter which, the uncontradicted evidence shows, appellant believed to have been requested by Mrs. Williams. App. 94, 96-97, 99, 123, 196. The undisputed facts conclusively demonstrate that appellant had no other contact with Mrs. Williams, and that as soon as she was informed that Mrs. Williams had no desire to litigate, she had no further contact with her.[8]

7/ Appellee relies heavily on the alleged dangers of "personal solicitation", and argues that appellant's letter constituted inter alia, "undue influence and overreaching" and "an invasion of privacy." Brief at 38,46. An FCC report on "home solicitation sales" and other studies on "direct selling" are marshalled to support these assertions. See, e.g., Brief at 39-40,46. See also Brief at 30. "The [appellant's] solicitation invaded the privacy of the home."

8/ Whatever pressure Mrs. Williams may have felt from others, she testified that appellant did not try to pressure or persuade her to file a lawsuit. Appendix 51,52. Thus, this case raises no question concerning

[Footnote Continued]

(5) Appellee strongly implies that the malpractice cause of action pleaded in the complaint in Doe v. Pierce, No. 74-475 (D.S.C. 1974) was dropped prior to trial because that cause of action obscured the ACLU's effort "to promote the civil liberties issue." Brief at 42 and n. 83. This outrageous charge is, of course, unsupported by the record, and has not been made before. Such conduct would plainly be contrary to the ACLU's policy that "in any case where the ACLU or an affiliate has undertaken to furnish direct representation, the judgment of the attorneys who provide such representation must be governed by the client's interest, not the organization's, since they are acting as attorneys for the client, and not for the ACLU." Policy #513, 1976

[Footnote 8 Continued]
a disciplinary rule or finding censuring an attorney for thrusting professional services on an individual who has expressly communicated a decision against litigation. Compare Lamont v. Postmaster General, 381 U.S. 301, 305 (1965); Rowan v. United States Post Office, 397 U.S. 728, 737, 738 (1970); Breard v. City of Alexandria, 341 U.S. 622, 626.

Policy Guide of the American Civil Liberties Union. As this Court is well aware, the ACLU has no hesitation in appearing as amicus curiae when it wishes to assert primarily its own organizational beliefs or when direct representation would obscure civil liberties issues. In fact, the record in Doe v. Pierce shows that the malpractice count was not tried because the trial court would not accept pendent jurisdiction over such a state law claim. Doe v. Pierce, Civ. No. 74-475, D.S.C., Appendix on appeal, sub. nom. Walker v. Pierce, 560 F. 2d 609 (4th Cir. 1977) Appendix, Vol. II, pp. 68-72.

(6) Finally, appellee asserts that the ACLU office was in the same offices as appellant. Brief at 5 note 2. That assertion is not supported by the record. In fact, the ACLU's offices were totally separated from appellant's office, although they were located in the same building.

II. Appellee's Legal Arguments Have No Merit.

Insofar as the legal arguments made in appellee's brief are not improperly predicated on factual misstatements, or upon facts not in the record, those arguments are generally refuted by the discussion in appellant's brief, and we will not repeat that legal analysis here. However, a few points merit brief reply.

A. None of the grounds on which the state attempts to distinguish NAACP v. Button or its succeeding cases involving the provision of legal services by organizations has merit. Although the state argues that Button was a case involving not "even-handed and neutral" rules but "censorial rules directed at a particular group or viewpoint" (Brief at 28), the Court in that case expressly declined to strike down the statute in question on the theory that its enactment was racially motivated (371 U.S. at 444-45). To the contrary, the Virginia Court held that the NAACP had violated the Canons, and relied on decisions of other

states construing the Canons as applied to solicitation in non-racially sensitive contexts. See NAACP v. Harrison, 202 Va. 142, 116 S.E. 2d 55, 67-68 (1960). Nor can Doe v. Pierce be considered "essentially private litigation for damages" in contrast with the NAACP's "actions against government" (Appellee's Brief at 25). The gravemen of Doe v. Pierce was precisely that the coerced sterilization alleged was state action, and the plaintiffs in Doe, just as plaintiffs in the NAACP's desegregation actions, sought to ensure that state action infringing constitutionally protected rights would be exposed, enjoined, and deterred.

In fact, as examination of the state court opinion in Button makes clear, the organizational behavior found constitutionally protected in Button (and other cases) was substantially more "aggressive" than the behavior for which appellant has been reprimanded in this case--behavior that, we repeat, consists of no more than a single letter addressed to a woman whom appellant reasonably believed had requested such a letter. See, e.g., NAACP v. Harrison 202

Va. 142, 116 S.E. 2d 55,65 (1960):

> "Members of the NAACP, representatives of the Conference and its legal staff appear before the membership of local branches and other groups in communities in which the organizations wish suits to be brought and by persuasive methods urge those present to assert their constitutional rights to eliminate racial discrimination by becoming parties plaintiff to legal proceedings, when many of the prospective litigants have had no previous thought of doing so. The services of attorneys selected by the NAACP, its conference and the Fund are offered at no cost to the prospective litigants as an inducement to institute suit."

See also NAACP v. Button, supra, 371 U.S. at 421. Similarly, the Court has reversed state decisions holding that attorneys may not be compensated for lawsuits generated by offers of services. NAACP v. Button, supra, 371 U.S. at 420, 434, 449; Brotherhood of Railroad Trainmen v. Virginia, supra, 377 U.S. at 7: United Mine Workers v. Illinois, 389 U.S. 217, 225 (1967). The South Carolina ACLU, on the other hand, has never allowed cooperating attorneys to be compensated, and the record shows that appellant was not even reimbursed for out-

of-pocket expenses for any of her ACLU activities.

Moreover, it is settled that the state cannot simply assert that an organization is controlling litigation in conflict with the interest of the client; the state has the burden of proving such improper control. NAACP v. Button, supra, 371 U.S. at 433, 444; UMW v. Illinois, 389 U.S. at 220. Cf., Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. at 9 (Clark, J., dissenting). There is no evidence of such improper control in the record of this case, and any inference of such control is contradicted by the ACLU's policy, supra, and Appellant's Brief at 52 note 1.9/

9/ Nor can NAACP v. Button be distinguished, as appellee would have it, on the ground that here, but not there, there is no identity of interest between the organization and its non-member potential client. See Brief at 41-42. The limitation of issues to be addressed, ratified by the client in a retainer agreement, is no different in principle or operation from the NAACP policy in Button to litigate only desegregation issues, and always to forego "equal facilities" strategies, regardless of the circumstances of the particular case. Cf. 371 U.S. at 462 (Harlan, J. dissenting).

B. To the extent the state identifies substantive evils it has a valid interest in preventing, the state must attempt to reach those evils through the least restrictive regulations. United Transportation Union v. Michigan, 401 U.S. 576, 581 (1971); Brotherhood of Railroad Trainmen v. Virginia, supra, 377 U.S. at 7-8; NAACP v. Button, 371 U.S. at 433-35.10/ But the reprimand at issue here was based on the state's interest in preventing evils that

10/ The letter to Mrs. Williams cannot properly be described as simply "commercial" speech. The letter included advice about the availability of free legal services to challenge enforced sterilization, and it repeatedly offered to convey additional information to Mrs. Williams regarding her rights. The letter also proposed that Mrs. Williams might help to publicize the important issues raised by enforced sterilization in South Carolina. J.S.A. at 25a-26a. Here, as in Bigelow v. Virginia, 421 U.S. 809, 822 (1975), "appellant's First Amendment interests coincided with the constitutional interests of the general public." New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Thomas v. Collins, 323 U.S. 516, 531 (1945); contrast, Pittsburgh Press v. Human Relations Commission, 413 U.S. 376, 385 (1973). Because the letter is virtually pure speech, not "speech plus", the doctrine of overbreadth is applicable. Cf. Broderick v. Oklahoma, 413 U.S. 601 (1973). Although
[Footnote Continued]

have not occurred, an interest that can be, and is currently protected by more narrowly drawn regulations than the overbroad construction of DR 2-103(D)(5) relied on here.

For example, South Carolina has adopted specific rules prohibiting "conflicts of interest." 11/ A state may directly regulate attorney's fees in certain cases, so that attorneys soliciting remunerative business cannot charge excessive fees. Legitimate privacy interests may be fully protected by protecting persons in particular situations where undue influence is likely, and by allowing them to prevent contacts by explicit notice to attorneys if they wish to

[Footnote 10 Continued]
Mr. Justice Harlan frequently referred to litigation as "speech plus", he did not, as appellee asserts, refer to an offer of services as "speech plus". See, NAACP v. Button, 371 U.S. at 455 (Harlan, J., dissenting).

11/ For example, DR 5-107(B) provides:

> "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgement in rendering such legal services."

See also DR 5-101(A), and Ethical Considerations 5-23 and 5-24. Appellee has never
[Footnote Continued]

be let alone.[12/] South Carolina concedes that "not all lawyers will mislead, overreach, or subordinate the interests of their clients (Brief at 48), and no reason has been advanced why the state could not prevent the evils it seeks to avoid with a narrower regulation. The construction of DR 2-103(D) urged by appellee would prohibit any attorney employed by a public interest organization like the ACLU or the NAACP, or any attorney assisting or cooperating with similar organizations (e.g., by sitting on the organization's Board of Directors, or

[Footnote 11 Continued]
previously asserted conflicts of interest in this case, even in its motion to Dismiss or Affirm in this Court.

12/ See, for example, proposed DR 2-104, Subcommittee on the Code of the Legal Ethics Committee of the District of Columbia Bar, reprinted in Bar Report, District of Columbia Bar, Vol. 4, No. 1, February 1976, p. 8. Cf. Rowan v. United States Post Office, 397 U.S. 728, 737, 738 (1970). In this regard, appellant notes that there is no record support for appellee's suggestion (Brief at 11) that appellant was aware at the end of August that Mrs. Williams' child was still ill. The Assistant Attorney General never asked Ms. Smith about Mrs. Williams' child at the disciplinary hearing. South
[Footnote Continued]

raising funds), from recommending to a non-lawyer that he or she retain the organization's services. Conversely, South Carolina's construction of DR 2-103(D) would prohibit any attorney whose work put him in contact with individuals to whom he recommended the services of a public interest legal organization from voluntarily assisting, at other times and in other ways, that organization. This is precisely the type of restriction on activities of attorneys that this Court explicitly rejected in NAACP v. Button, supra, 371 U.S. at 434-435. The impact of this construction of the activities of the public interest bar cannot be overstated and stands in stark constrast with Congress' recent determination to support the civil rights bar (including, specifically, public interest organizations) by authorizing awards of reasonable

[Footnote 12 Continued]

Carolina's new-found interest in protecting Mrs. Williams from invasions of privacy and from overreaching has not lead to disciplinary charges against Dr. Pierce's attorney, who was aware of that critical illness and who asked her to sign a release after confronting her in Dr. Pierce's office where she had gone for a checkup. App. 50, 243. Compare DR 7-104(a)(2).

attorneys fees in civil rights actions. 42 U.S.C. §1988. It cannot be assumed that Congress would encourage the unethical practice of law by attorneys; yet the effect of the Civil Rights Attorney's Fees Awards Act of 1976 in South Carolina is to disable every lawyer who assists or cooperates with public interest organizations which furnish legal services from recommending the services of those organizations. A state may not invoke disciplinary sanctions on attorneys when such sanctions "infringe... the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." Brotherhood of Railroad Trainmen v. Virginia, supra, 337 U.S. at 7.

C. Appellee now concedes that appellant cannot constitutionally be reprimanded for the activities she undertook at the July meeting. But if educational activities at that meeting were protected, so too is the August letter, which had precisely the same purpose--that is, to inform Mrs. Williams of the facts necessary to make an informed

choice about litigation.13/

D. Appellee concedes on appeal that the reprimand must be based on compelling state interests, and goes to great length in this Court to comply with this fundamental requirement for state regulations that affect the exercise of constitutionally protected activity. But the record and the opinion below do not specify or reflect any of the interests appellee now asserts were infringed by appellant's conduct. Appellee asks this Court to assess, de novo, the importance of the various interests it belatedly asserts, although they were never mentioned in its briefs before the court

13/ See Appellee's Brief at 30. Appellee's claim that appellant's letter "did not provide any additional information to Mrs. Williams" is misleading. The purpose of the letter, stated clearly in the first and last paragraphs, was to arrange a meeting where additional information could be conveyed. The letter also advised Mrs. Williams for the first time that the ACLU was definitely willing to provide legal representation if she so desired.

below. Since the state court relied on none of them, this Court should not either, Sherbert v. Verner, 374 U.S. 398, 407 (1963). No reason has been advanced to justify ignoring that sound rule in this case.

E. Even if the Court considers it appropriate to review the alleged state interests, it is clear for the reasons advanced in appellant's brief at 45-51 that those interests do not justify discipline of appellant for the sole act of writing the August letter.

F. The State devotes its entire discussion of the question of fair notice to the proposition that citation of a particular rule is not necessary to give fair notice. However, that discussion misses the gist of appellant's argument: i.e., that the charge must specify the elements to which a response is required. Indeed, in the principal South Carolina case relied upon by appellee, the complaints set forth detailed recitations of the factual bases for the charges and cited four specific Canons of Ethics. Burns v. Clayton, 237 S.C. 316, 117 S.E. 2d 300, 307-308 (1960). As set forth in appellant's Reply to Motion to Dismiss or

Affirm, pp. 10-11, there were numerous crucial elements that were wholly omitted from the complaint here. Indeed, appellant's Memorandum filed with the hearing panel stated unambiguously her understanding that the only rule she was being charged with was DR 2-103(A). See Brief for Appellant at 69.

Finally, throughout the proceedings, the hearing panel repeatedly disclaimed any interest in the operation of the ACLU, so that appellant and her counsel assumed the panel had rejected any argument based on DR 2-103(D). Such proceedings simply cannot be squared with the fair notice required by due process of law.

CONCLUSION

For the foregoing reasons, the order and judgment of the Supreme Court of South Carolina should be reversed.

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* We wish to acknowledge the substantial assistance of Charles Sims, a candidate for admission to the New York bar, in the research and drafting of this reply brief.